Supreme Court, U.S.
FILED
APR 29 1986
JOSEPH F. SPANIOL, JR.
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No. 85-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,

Appellant,

—v.—

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Does the First and Fourteenth Amendment right of political association preclude a state from seeking to restrict a state political party's constitutionally permissible attempt to expand voter participation in party primaries?

2. If a state may restrict a state political party's constitutionally permissible attempt to expand voter participation in party primaries, is the state statute at issue here supported by compelling state interests and narrowly drawn to serve such interests?

3. Is appellees' party rule expanding voter eligibility to participate in statewide party primaries subject to the qualifications provisions of Article I, § 2 and the Seventeenth Amendment to the United States Constitution, and, if so, does the party rule violate those provisions?

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLEES

STATEMENT OF THE CASE

This appeal involves the effort by a minority party to expand its party membership and increase its popular support by allowing unaffiliated voters to participate in the party's candidate selection process. The district court and court of appeals held that the party's activity was protected by the First and Fourteenth Amendment right of freedom of association and could not be foreclosed by a state statute purporting to restrict the scope of permissible voter participation in state primaries. The State has appealed.

The plaintiff Party—the Republican Party of the State of Connecticut (the "Party")—is a political party consisting of individuals who associate themselves for the common advance-

ment of political beliefs and ideas. [J.S.App.* 245]. As stated in the Preamble to the Party Rules, the Party "encourages fullest voter participation in its activities and supports the broadest possible membership registration." [J.A. 46]. The Party "solicits the ideas, the interest and the participation of all segments" of the population. [J.S.A. 47]. The ultimate goal of the Party is to "seek out, designate, and secure the election of qualified candidates for public office at the Federal, State and Local levels of Government," who will implement Party policies, philosophies and programs. [J.S.App. 245, 246; J.A. 45-48].

Although, by law, the Republican Party is one of the two major political parties in Connecticut, *see* Conn. Gen. Stat. § 9-372(e), the Party has, for some time, had the status of a minority party in Connecticut politics. It has been substantially outnumbered in Connecticut, not only by registered Democrats but by unaffiliated voters as well. At the time this action was commenced, there were 659,268 registered Democrats, 532,723 unaffiliated voters and 425,695 registered Republicans in Connecticut. [J.S.App. 244]. As of October 1984, there were 718,772 registered Democrats, 608,613 unaffiliated voters and 477,749 registered Republicans. [J.S.App 20-21 n. 4, citing to *The Hartford Courant*, Jan. 4, 1985 at A6]. Thus, the enrolled members of the Republican Party constitute less than thirty percent of the registered voters in the State of Connecticut, and Connecticut Democrats have a greater than fifty percent membership advantage over Republicans.

Not surprisingly, in light of this statistical disparity, the Party has had limited electoral success in recent years in statewide elections for Governor, United States Senator and Representative. Since 1958, Repubicans have won only 4 of 16 statewide elections for Governor and United States Senator and only 25 of 84 of the elections for United States Representative.

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* "J.S.App." denotes references to the Appendix to appellant's Jurisdictional Statement; "J.A." denotes the parties' Joint Appendix; and App.Br. refers to Appellant's Brief.

[J.S.App. 20-21 n. 4, citing to *State of Connecticut Register and Manual* 72-82 (1983); 42 Cong. Q. 2923 (Nov. 10, 1984)].

In August 1983, the Party's State Central Committee established a subcommittee to study the Party's existing rules and recommend ways in which the Party could improve its ability to win general elections and strengthen the two-party system in Connecticut. [J.S.App. 249, 103]. The subcommittee, consisting of members of the State Central Committee, representatives of town committees and past and present elected officials, met on three occasions in September 1983 and adopted a resolution calling for a revision of Party rules to allow unaffiliated voters to vote in Republican primaries. [J.S.App. 282, 284].

Based upon the subcommittee's study and recommendations, State Republican Chairman Thomas J. D'Amore, Jr. duly called and noticed a state party convention to consider, *inter alia*, "proposed changes to allow unaffiliated voters to vote in Republican Party candidate selection primaries." [J.S.App. 250].

On January 14, 1984, delegates to the state party convention approved an amendment (the "Rule") to the Party rules to allow unaffiliated voters to join enrolled Republicans in voting in Republican Party primaries for candidates for the offices of United States Senator, United States Representative, Governor and the gubernatorial underticket. Specifically, the Rule provides as follows:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

[J.S.App. 251-52].

The Rule does not allow members of other political parties, such as the Connecticut Democratic Party, to participate in Republican primaries. In addition, pursuant to Conn. Gen. Stat. § 9-59, an enrolled member of any party who renounces party membership is barred for six months from participating in another party's primary. Thus, any unaffiliated voter who has been previously enrolled in another party would be precluded from participating in Republican primaries for six months after leaving the other party.[1]

The Rule does not conflict with or affect the statutory requirements which must be met by Party candidates to qualify for placement on the primary ballot through the Party's convention system. The Party's nominating convention is still to be comprised solely of Party members, *see* Conn. Gen. Stat. § 9-372, and a candidate must receive twenty percent of the vote cast at the convention in order to force a primary. *See* Conn. Gen. Stat. § 9-400.

The Rule is, however, in direct conflict with § 9-431 of the Connecticut General Statutes ("the statute") which prohibits unaffiliated voters from voting in any party primary. The statute provides, in pertinent part, that:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district, as the case may be. . . .

[App. 254].

In an attempt to avoid the conflict between the Party Rule and the statute, Republican legislators introduced legislation during the 1984 and 1985 sessions of the Connecticut General Assembly to amend the statute. The principal legislative proposal would have enabled the Republican Party to implement its Rule by amending the statute to provide:

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1. The validity of § 9-59 has not been challenged by appellees.

> EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district, as the case may be. . . .

[App. 255-56]. This proposed legislation is similar to the laws in effect in Alabama, Arkansas and South Carolina, which provide that a party shall establish the qualifications for participation in its party primaries. *See* Ala. Code § 17-16-14; Ark. Acts §§ 3-102, 3-115; S.C. Code Ann. § 17-9-20.

During the course of state legislative hearings on the proposed legislation, the Director of appellant's Elections Division testified that this proposal was "workable." Specifically, he stated that:

> [T]he idea of [the proposal]—is workable. Including from an election administration point of view even having unaffiliated electors vote for some but not all offices on the primary ballot. That is workable from an election administration viewpoint provided we by regulations do such things as provide for the registrars to produce a list of unaffiliated voters to be checked off at the polls. . . .
>
> [We could also provide for] the clerks [to] print two versions of the absentee ballot and direct those respective versions to members of the party or unaffiliated electors as the case may be. And . . . lastly that there be two machines set up with two different ballot strips depending upon who is entering the machine . . . If an unaffiliated electors would enter [sic] those machines that have only the offices that they're entitled to vote for of that party and the regular rank and file of the party could vote for the broader number. . . .

[J.S.App. 257; J.A. 89-93].

The proposed legislation to allow implementation of plaintiffs' Rule was defeated in 1984 in committee and in both houses of the Connecticut legislature by the Democratic Party,

which then controlled both houses. [J.S.App. 23-29, 255-61]. The voting in each house followed strict party lines. [J.S.App. 258-59, 260-61]. The legislation was passed in 1985 by the presently-Republican controlled Connecticut legislature [App. Br. 49a-53a], but Democratic Governor William A. O'Neill vetoed the bill. [J.S.App. 28-29 n. 7; App.Br. 54a].[2]

In May 1984, after their first effort to enact legislation to implement their Rule had failed, appellees commenced this action challenging the constitutionality of § 9-431 as applied to the Party Rule and seeking preliminary and permanent injunctive relief. In addition to the plaintiff Republican Party, the individual plaintiffs are members of the Party, including the Party's chairman and principal federal elected officials. [J.S.App. 245-48].[3] The defendant Secretary of the State is charged by statute with the administration of the State's

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2. Appellant is technically correct that the court of appeals erred when it stated that § 9-431, which was originally passed in 1955, was "enacted" by a Democratic-controlled state legislature. App.Br. at 71. The statute was, however, plainly maintained in its present form by the Democratic legislature in 1984 and by the Democratic governor in 1985.

3. The plaintiff Republican Party was a defendant in *Nader* v. *Schaefer*, 417 F.Supp. 837 (D.Conn.) (three judge court), *aff'd. mem*, 429 U.S. 989 (1976), and in that litigation opposed the efforts of independent voters to participate in party primaries against Party wishes and in violation of then-existing Party rules. In *Nader*, the Republican Party asserted a First Amendment right to determine with whom it would associate in its candidate selection process. The Party asserts the same First Amendment right of association in this litigation on the basis of its present Party rules.

Plaintiff Weicker also participated in *Nader*, as an *amicus curiae*. In *Nader*, plaintiff Weicker argued for the right of unaffiliated voters to have a meaningful voice in party elections and unsuccessfully urged they be allowed to participate in Connecticut party primaries. Plaintiff Weicker asserts a consistent position in this litigation, now based on the amended Party rules authorizing such participation by independent voters in Republican primaries.

The suggestion of the appellant, and of the *amici* States, that either the Party or plaintiff Weicker is foreclosed by its or his position in *Nader* from the relief sought in this action is legally and factually without basis.

election and primary laws, including the challenged statute. [J.S.App. 248-49].

The parties agreed to consolidate a hearing on appellees' application for preliminary injunctive relief with trial on the merits and joined in filing a Joint Statement of Facts, Supplemental Joint Statement of Facts and Joint Submission of Documents. Appellees thereafter filed a motion for summary judgment and appellant filed a motion to dismiss. No other evidentiary materials were presented by the parties or relied upon in the parties' memoranda or argument in the district court.[4]

On December 5, 1984, the district court granted appellees' motion for summary judgment and denied appellant's motion to dismiss.[5] The court held that the statute imposed substantial

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4. In her brief to this Court, appellant has seen fit to cite deposition testimony and exhibits not presented to the district court or relied upon by either party in the district court proceedings. *See* App.Br. at 69-70, 69 n. 24. To this end, appellant filed a motion in the district court—after her Brief had been filed with this Court—seeking an order that certain depositions be filed with the district court for apparent use in the proceedings in this Court. The district court's Order in response to appellant's motion, Supp. Rec. Doc. 1, makes clear that no evidentiary materials other than the Joint Statement of Facts, Supplemental Joint Statement of Facts and Joint Submission of Documents were presented below and that the deposition materials and exhibits now proferred by appellant are not properly before this Court.

   Appellant has attempted, through the use of such extra-record materials, to impugn the motives of one of the individual plaintiffs, suggesting that he was motivated by "personal interests" as distinguished from those of the Party in supporting the Party rule. This suggestion, even if predicated on proper evidentiary materials, would be wholly unsupportable. There is no dispute in this case that the Party Rule was formally adopted by the entire Republican Party after initiation by the State Central Committee, study by a subcommittee of diverse Party members, and approval by delegates to the State Party convention. The procedures followed by the Party in enacting the amendment to its rules adhered to the requirements imposed by Connecticut statutes, as set forth by appellant's Director of Elections in a letter to counsel for the Party in August 1983. [J.S.App. 49-61].

5. Because appellant supplemented her motion with factual materials, the district court treated her motion to dismiss as one for summary judgment. *See* Rule 12(b)(6) of the Federal Rules of Civil Procedure.

burdens on appellees' right of association under the First and Fourteenth Amendments to the United States Constitution by allowing the State to "substitute its judgment for that of the party on . . . the question of who is and [who] is not sufficiently allied in interest with the party to warrant inclusion in the candidate selection process." [J.S.App. 185]. The court further held that appellant had not proved the existence of any compelling state interests necessary to sustain the statute or that the statute was narrowly drawn to serve the interests asserted by the State. The court therefore enjoined enforcement of the statute, as applied to the Republican Party Rule.

On August 8, 1985, the court of appeals affirmed, agreeing that the statute infringed on the Party's First Amendment right to identify who may participate in its candidate selection process and that the State had failed to prove any compelling interests or precise tailoring to justify the statutory infringement.

A notice of appeal to this Court was filed in the court of appeals on September 20, 1985, appellant's Jurisdictional Statement was filed on November 4, 1985, and probable jurisdiction was noted on January 13, 1986. On April 17, 1986, the court of appeals stayed its decision pending the outcome of this appeal.

SUMMARY OF THE ARGUMENT

I.

It is a fundamental tenet of our democratic system of government that minority groups have the right to seek new members and form coalitions with other individuals or groups in order to achieve a ruling majority. L. Tribe, *American Constitutional Law*, 774 (1978). As long as a political party does not act on the basis of constitutionally impermissible criteria, its determination of how and with whom it will form such associations is absolute. *Democratic Party of the United States* v. *Wisconsin*, 450 U.S. 107 (1981).

Section 9-431 of the Connecticut General Statutes, as applied to appellees' Party Rule, infringes the Party's First Amendment rights to determine its membership and to expand popular support for its policies and candidates. The statute also interferes with the rights of unaffiliated voters in Connecticut to exercise the right of political association with the Party now afforded them under the Party rules. Further, the statute infringes the rights of Party candidates to exercise their rights of personal advocacy under the First Amendment to solicit independent voter support in Party primaries and thereafter.

Appellees submit that a state may not, under any circumstances, *restrict* a political party's constitutionally permissible determination to *expand* voter participation in its processes. But even if the State has the power to restrict a minority party's right to expand its popular base, the power must be supported by compelling state interests and must be narrowly drawn. *William* v. *Rhodes*, 393 U.S. 23 (1968). The statute at issue here fails to meet this standard of constitutional scrutiny.

None of the interests identified by the State are compelling in the factual context of this case. No voter confusion will result from the inclusion of unaffiliated voters in the Republican Party primary process. Republican candidates will still be selected by party members at the state convention. Conn. Gen. Stat. § 9-372, *et. seq*. More fundamentally, the State has no legitimate interest in requiring a political party to maintain a preexisting ideology or constituency.

The Party Rule does not provide any additional opportunity for inter-party "raiding." The Party has only invited unaffiliated voters to participate in its primaries and does not allow registered Democrats to "cross-over" and vote in Republican primaries. Furthermore, because the Party has invited unaffiliated voters to participate in its candidate selection, no issue of "raiding" is presented by their involvement in Party primaries.

Appellant's factual contention that the Party Rule is administratively unfeasible was rejected by the lower courts and does not warrant this Court's reconsideration. *Branti* v.

Finkel, 445 U.S. 507, 512 n. 6 (1980). Indeed, the Director of appellant's Elections Division testified at state legislative hearings that the Party Rule is administratively feasible. [J.A. 89-93].

The Rule does not undermine the two party system. The State has not demonstrated that political chaos will result from the Party's inclusion of unaffiliated voters at its primaries. Open and modified open primaries are utilized in numerous states, and serve to increase voter participation in the electoral process. *See Rosario* v. *Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting). The State has offered no tenable explanation for why the Party's Rule will undermine the two party system in Connecticut.

II

The State's power to supervise primary elections under Article I, §§ 2 and 4 and the Tenth and Seventeenth Amendments is subject to the constitutional restrictions on the exercise of such authority imposed by the First Amendment. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). While the State may have the authority to insist on a primary process that is sufficiently representative to insure meaningful voter participation, the State may not, consistent with the First Amendment, exercise its power to restrict voter participation in a Party's fair and constitutionally permissible primary process.

III

The Party Rule does not violate the qualifications provisions of Article I, § 2 and the Seventeenth Amendment, which do not, in language or intent, apply to party primaries. Appellant's reliance on *United States* v. *Classic*, 313 U.S. 299 (1941), and *Smith* v. *Allwright*, 321 U.S. 649 (1944), for the proposition that a primary is an election under Article I, § 2 is misplaced. *Classic* holds that federal regulation of primaries is warranted in order to preserve the vitality of the Article I, § 2 right to vote at general elections; *Smith* holds that because

primaries are an integral part of a state's electoral system the conduct of political parties in a primary may constitute state action under the Fourteenth and Fifteenth Amendments. Neither case supports appellant's contention that a primary is an election subject to the Constitution's electoral prescriptions. In *Ray* v. *Blair*, 343 U.S. 214 (1952), this Court specifically rejected that contention.

Moreover, appellees' Party Rule is fully consistent with the language and intent of the qualifications provisions. These provisions were designed to insure that states do not restrict voter eligibility to participate in federal legislative elections beyond the eligibility requirements for statewide legislative elections. The Party Rule expands voter eligibility for federal legislative primaries.

ARGUMENT

I. CONNECTICUT GENERAL STATUTES SECTION 9-431, AS APPLIED TO THE PARTY RULE, UNCONSTITUTIONALLY INFRINGES APPELLEES' FIRST AND FOURTEENTH AMENDMENT RIGHTS OF POLITICAL ASSOCIATION.

This case involves a conflict between a state political party's decision to expand voter participation in its candidate selection process through coalition with other voters and a state statute prohibiting the proposed coalition. The right of a minority to form such associations lies at the core of our constitutional form of government. As Alexis de Tocqueville recognized over one hundred years ago:

> [T]he liberty of [political] association has become a necessary guarantee against the tyranny of the majority. In the United States, as soon as a party has become dominant, all public authority passes into its hands. . . . As the most distinguished members of the opposite party cannot surmount the barrier that excludes them from power, they must establish themselves outside of it. . . .

> The omnipotence of the majority appears to me to be . . . full of peril. . . . There are no countries in which associations are more needed to prevent the despotism of faction . . . then those which are democratically constituted.

1 A. de Tocqueville, *Democracy in America* 193-95 (H. Reeve ed. 1976).

The right of political association has long been afforded constitutional protection as a necessary concomitant of freedom of speech and belief. Writing for a unanimous Court in *NAACP* v. *Alabama*, 357 U.S. 449, 460-61 (1958), Justice Harlan stated that:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political [or other] matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Thus, "though freedom of belief is central, 'the First Amendment protects political association as well as political expression.' " *Elrod* v. *Burns*, 427 U.S. 347, 357 (1976), quoting *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). "The right of association with the political party of one's choice is an integral part of this basic constitutional freedom," *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973), and "like free speech, lies at the foundation of a free society." *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960).

The protections afforded the right of association "reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), a principle itself reflective of the fundamental understanding that '[c]ompetition in ideas and governmental policies is at the

core of our electoral process . . . ,' *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968)." *Elrod* v. *Burns*, *supra* at 357.

In this case the State seeks to deny a state political party the right to expand voter participation in its candidate selection process. This Court has never before considered the constitutional conflict resulting from a state statute which *restricts* a *state* party's voter qualification rules.[6] *See* Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L. J. 117 (1984).

The Court has previously reviewed conflicts between a state statute regulating participation in candidate selection and *national* party rules. *See Cousins* v. *Wigoda*, 419 U.S. 477 (1975); *Democractic Party of United States* v. *Wisconsin*, 450 U.S. 107 (1981) ("*Democratic Party*"). The Court has also considered *individual voter* challenges to a state statute restricting participation in a party's candidate selection process. *Kusper* v. *Pontikes*, *supra*; *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *see Nader* v. *Schaeffer*, 417 F.Supp. 837 (D.Conn.) (three-judge court), *aff'd*, *mem*, 429 U.S. 989 (1976).[7]

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6. The Court has, of course, ruled that a state party's effort to exclude qualified voters from its candidate selection process is subject to Fourteenth and Fifteenth Amendment constraints. *See Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *cf.*, *Gray* v. *Sanders*, 372 U.S. 368 (1963); *see also Roberts* v. *United States Jaycees*, ____ U.S. ____, 104 S.Ct. 3244 (1984). This case, however, involves no issue of invidious discrimination or other denial of equal protection of the laws under the federal or Connecticut Constitutions.

7. In *Nader*, the constitutionality of § 9-431 was upheld against a challenge by unaffiliated voters who sought to participate in primaries against party wishes. In *Nader*, the court was concerned that the "primary election results reflect the will of party members," and in preserving "the associational rights of . . . party members." 417 F.Supp. at 846-47. Accordingly, the court refused to allow the "outsiders" into the party process.

This case, however, presents precisely the opposite situation to that posed in *Nader*. The Republican Party has determined that unaffiliated voters should be allowed to join in selecting candidates for certain offices. Thus, to ensure that "primary election results reflect the will of" Republican Party members, unaffiliated voters should be allowed

The Court has further considered government regulation of a state party's attempts to *restrict* voter participation in a primary process. *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *see Roberts* v. *United States Jaycees*, ____ U.S. ____, 104 S.Ct. 3244 (1984).

Although the Court has never been confronted with a state's claim that it has the constitutional power to restrict a state party's attempt to *expand* voter participation in its candidate selection process, several guiding constitutional principles may be drawn from the related cases considered by the Court:

First, it is well established that a political party's decision about who may participate in its candidate selection process is fundamental and fully protected by the First and Fourteenth Amendment right of political association. *Kusper* v. *Pontikes*, *supra* at 58.

Second, while government has the power to regulate a state party's attempt to exclude qualified voters from the candidate selection process, *Terry* v. *Adams*, *supra*; *see Roberts* v. *United States Jaycees*, *supra*; it has limited or *no* power to restrict a state party's attempt to expand voter participation in the candidate selection process, as long as the party's efforts are otherwise constitutionally permissible. *Democratic Party*, *supra* at 123-24.

Third, any authority the state does have to regulate a state party's candidate selection process must be justified by compelling state interests and narrowly exercised to further such interests. *Roberts* v. *United States Jaycees*, *supra* at 3258.

Appellees submit that in this case the State of Connecticut has no authority to interfere in the Party's constitutionally permissible decision to expand voter participation in its primary process. Appellees further contend that the state statute

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to participate in party primaries. The prohibition imposed by § 9-431 constitutes an "interference with the associational rights of [the party and] its members" and is therefore unconstitutional. *Id.* at 845.

at issue is, as applied to the Party rule, unsupported by compelling state interests and not narrowly drawn to serve such interests. The statute interferes impermissibly and unnecessarily with appellees' First Amendment freedom of political association and was properly held to be unconstitutional as applied.

A. Absent Constitutionally Impermissible Criteria, A Political Party's Freedom to Expand Voter Eligibility to Participate in Its Candidate Selection Process is Absolute and Its Decisions Cannot Be Restricted By the State.

Appellees submit that, unless a political party relies upon constitutionally impermissible criteria, the State may not, under any circumstances, restrict the party's decision to expand voter participation in its candidate selection process.

While a compelling state interest test may apply to other forms of governmented intrusion into a party's First Amendment right of political association, *Democratic Party, supra*, including a party's attempt to narrow its membership, *see Terry* v. *Adams, supra*; *Smith* v. *Allwright, supra*; *Roberts* v. *United States Jaycees, supra*; the Court has never held that the state or federal government has the power to prohibit a political party from forming constitutionally permissible coalitions to expand its popular support.

A political party's freedom to enlarge its associational boundaries—either by adding new members or by forming coalitions with other parties or groups of voters—is an essential component of the democratic form of government. "Democracy envisions rule by successive temporary majorities." L. Tribe, *American Constitutional Law* 774 (1978) ("Tribe"). It is founded on the proposition that minority groups will grow and, as necessary, unite in the electoral system to form "new" majorities that ultimately will displace the ruling majority. *Id.*; F. Sorauf, *Political Parties in the American System* 2-6 (1964); Note, *The Right to Vote and Restrictions on Crossover Primaries*, 40 Chi. L. Rev. 636, 654 (1973).

The ruling majority—i.e., the State—is necessarily allowed to regulate the electoral system to insure a fair and orderly election process, including fair access to the candidate selection process for all members of the populace. *See, e.g., United States* v. *Classic*, 313 U.S. 299 (1941); *Smith* v. *Allwright*, *supra*. However, a political party's decision to seek new members or to ally itself with new groups or individuals, if constitutionally permissible, implicates no legitimate state concern and is not subject to state restriction. To the contrary, the First Amendment guarantees that the majority may not entrench itself by preventing the growth of competing parties. *Anderson* v. *Celebrezze*, 460 U.S. 780, 803 (1983) ("the powers of the state should not be invoked to assure monolithic control over political parties"); *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968).

A political party's freedom to associate "necessarily presupposes the [party's] freedom to identify the people who constitute the association." *Democratic Party*, *supra* at 122. Absent constitutionally invalid criteria, a political party's First Amendment right to choose its members and its requirements for participation in party affairs remain absolute. "[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts—so long as those requirements are otherwise constitutionally permissible." *Id.* at 123 n. 25; *accord*, *Cousins* v. *Wigoda*, *supra*; *O'Brien* v. *Brown*, 409 U.S. 1, 4 n. 1 (1972);[8] *Rodriquez* v. *Popular Democratic Party*, 457 U.S. 1, 14 (1982); *cf.*, *Ripon*

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8. Appellees recognize that *Democratic Party*, *Cousins* and *O'Brien* were decided in the context of a conflict between state laws and national party rules about its presidential delegate selection process. *See Bellotti* v. *Connolly*, ____ U.S. ____, 103 S.Ct. 503 (1983) (Stevens, J., dissenting from dismissal of appeals). The quotations above from the Court's decision in *Democratic Party* were not, however, limited in words or by necessary implication to national political parties. As one leading commentator has observed, the Court's First Amendment analysis is equally applicable to the associational interests of state parties. *See Tribe*, at 787 ("the infringement of the associational rights of a party and its members [found in *Cousins*] would be substantially the same if the processes at stake were those of the state party rather than the national party").

Society, Inc. v. *National Republican Party*, 525 F.2d 567, 585 (D.C.Cir. 1975) (*en banc*).

Only when a political party seeks to exercise rights of association in violation of Fourteenth or Fifteenth Amendment commands is state regulation of party membership permissible. *Terry* v. *Adams*, *supra*; *Smith* v. *Allwright*, *supra*; *cf.*, *Gray* v. *Sanders*, 372 U.S. 368 (1963); *see O'Brien* v. *Brown*, *supra* at 4 n. 1.

A party's freedom to choose with whom and how it will associate is nowhere more fundamental than in its candidate selection process. "A basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process." *Kusper* v. *Pontikes*, *supra* at 58. A party's selection of its candidate is thus "an ultimate and crucial element of the party members' political activity." *Nader* v. *Schaffer*, 417 F. Supp. at 844; Note, *Freedom of Association and State Regulation of Delegate Selection*, 36 Vand. L. Rev. 105, 134 (1983); Note, *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1115 (1975). "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Democratic Party*, *supra* at 122; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

As one commentator has thus stated:

> [The] right of a political party to determine its own membership by any standard it pleases is unimpaired as long as it does not abridge the right to vote free from racial, and probably sexual, discrimination.

Kester, *Constitutional Restrictions on Political Parties*, 60 Va.L.Rev. 735, 759-60 (1974); *accord*, *The Supreme Court, 1980 Term*, 95 Harv.L.Rev. 91, 244 (1981) ("If this freedom [of political association] is to have any content, a [party] must be able to determine who will participate in its decisionmaking process . . ."); Note, *The Right to Vote and Restrictions on*

Crossover Primaries, 40 Chi.L.Rev. at 659. ("The right of association should require these decisions [about eligibility to participate in party primaries] to be made by each party. The government is prohibited from impairing the organization of a group seeking to nominate a candidate.")

The Party's decision in this case to involve unaffiliated voters in its candidate selection process represents a determination by the Party that a coalition with the large bloc of Connecticut's independent voters offers an opportunity for the Party to achieve a ruling majority. The Party Rule thus reflects the Party's willingness to allow unaffiliated voters a voice in determining Party candidates and policy in an effort to induce independent voters to participate in Party affairs and support Party nominees. Such cultivation of broad, bi-partisan support is a principal goal—and essential function—of a political party in our democratic system:

> Inasmuch as parties in competitive systems seek to win the electoral support of groups that may not be particularly predisposed toward political participation, the parties serve to pull these groups into more active involvement in the polity and thus to integrate them into the political system and its processes.

R.E. Dawson, "Social Development, Party Competition, and Policy," in *The American Party System* 208-9 (1967); *see also* A. Ranney, *Curing the Mischiefs of Faction* 201 (1975).

The State—representative of the political party in power—may not, consistent with the democratic theory of government, seek to restrict such a coalition. It may be that independent voters, once induced to participate in Party affairs, will, in fact, decide to affiliate formally with the Party; it may be that such voters will retain their independent status, but support the Party's nominees nonetheless; or it may be that Party policy and direction will be affected, to an unknown degree, by independent voter involvement in selecting Party candidates. In any eventuality, the Party's First Amendment right of political association fully protects the Party's effort to obtain

unaffiliated voter support. The Party's alliance with independent voters involves no impermissible discrimination and may not be regulated by the State.

B. The Statutory Infringement of Appellees' First Amendment Rights is not Justified by Compelling State Interests or Narrowly Tailored to Serve Such Interests.

Appellees have argued above that their First Amendment right to associate with independent voters cannot be restricted by the State. Even if a state may interfere with a political party's constitutionally permissible decision to expand primary voter eligibility, the interference must, at the very least, be supported by compelling state interests, *Democratic Party, supra* at 124; *Williams* v. *Rhodes, supra* at 31; and be narrowly drawn to serve such interests. *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972). As the lower courts held, the statute substantially interferes with appellees' First Amendment rights and, as applied to the Party Rule, serves no compelling state interests and is not narrowly drawn.

1. The Statute Imposes a Substantial Burden on Appellees' First Amendment Rights of Political Association.

Appellees have previously discussed the fundamental right of a political party to select its candidates without state interference. In addition to infringing that basic function of a political party and its adherents, the statute impermissibly interferes with the First Amendment rights of the Party, its adherents and its candidates for office in other substantial respects.

a. The Statute Interferes with Appellees' Right to Encourage Unaffiliated Voter Participation at General Elections.

It is axiomatic that the ultimate goal of a political party is to shape the policies and programs of government through the election of its candidates. *Storer* v. *Brown*, 415 U.S. 724, 745 (1974). To win elections, a minority party must aggregate

various interests to create coalitions and attract bi-partisan support not only at primary elections, but, more important at the general elections. *See, e.g.*, F. Sorauf, *Political Parties in the American System* 2-6 (1964); Note, *The Right to Vote and Restrictions on Crossover Primaries*, 40 Chi. L. Rev. at 654. In particular, as a minority party in Connecticut, it is necessary for the Republican Party to enlist the support of Connecticut's 600,000 unaffiliated voters at Connecticut's general elections.

The Party Rule encourages independent voter support for Party candidates at general elections in several respects: first, by securing the unaffiliated voter's involvement for a particular candidate at the primary stage, the Party increases the likelihood that the voter will participate at the general election. A voter who participates in a primary is more likely to vote in the general election, *see* M.E. Jewell, *Voting Turnout in State Gubernatorial Primaries*, 30 W. Pol. Q. 236, 244 (1977). Furthermore, an independent voter who identifies with a party's "community of interest" or who participates in a primary in order to "associate with a party presenting 'candidates or issues more responsive to [his] immediate concerns,' " Comment, *The Constitutionality of Non-member Voting in Political Party Primary Elections*, 14 Willamette L. J. 259, 290 (1978), quoting *Rosario* v. *Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting), may reasonably be expected to support candidates previously supported in a primary. "A voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

Second, the involvement of some unaffiliated voters in Republican Party primaries can help ensure that the Party selects candidates with sufficient appeal to other like-minded independent voters to obtain their bi-partisan support at the general election. *Anderson* v. *Celebrezze*, *supra* at 788 ("a candidate serves as a rallying point for like-minded citizens"). As Justice Powell has noted, an open primary

> "allows relatively independent voters to cast their lot with the party that speaks to their present concerns. By attract-

> ing participation by relatively independent-minded voters, the [open primary] arguably may enlarge the support for a party at the general election."

Democratic Party, supra at 132-33 (Powell, J., dissenting).

Finally, unaffiliated voters who become interested and involved with particular Republican Party candidates may well be induced to support those candidates actively, by providing financial support and by participating in campaign activities in the general election. Such assistance in the general election campaign will help increase "the size of the audience reached," *Buckley* v. *Valeo*, 424 U.S. at 19, promoting greater discussion of issues and candidates and additional voter support.

Section 9-431 interferes with appellees' ability to induce unaffiliated voters to join and support them in the electoral process and thereby inhibits the Party's efforts to elect candidates on a bi-partisan basis. *See* Note, *The Right to Vote and Restrictions on Crossover Primaries*, 40 Chi. L. Rev. at 644. Thus, the statute infringes appellees' First Amendment right to seek the support of unaffiliated voters—whose support they need to win the general elections.

b. The Statute Impermissibly Interferes With the Right of Qualified Voters to Participate in Party Affairs.

In addition to interfering with the First Amendment rights of the Party, the statute also violates the First Amendment rights of independent voters to exercise the freedom of association now afforded them by the Party.[9] The Party has granted the right to participate in its affairs to a bloc of new potential adherents, and those adherents have a First Amendment right to ally themselves with the Party. *Contrast Nader* v. *Schaeffer*,

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9. The Party has standing to assert the First Amendment rights of unaffiliated voters with whom it seeks to associate. *NAACP* v. *Button*, 371 U.S. 425, 428 (1963); *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958).

supra (unaffiliated voters *not* permitted to participate by political party).

The Court has consistently held that where the franchise exists, all qualified voters have a constitutionally protected right to vote. *Dunn* v. *Blumstein*, *supra*; *Kramer* v. *Union School District*, 395 U.S. 621 (1969); *Carrington* v. *Rash*, 380 U.S. 89 (1965). This right is fully applicable to voting in primary elections. *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Terry* v. *Adams*, *supra*; *United States* v. *Classic*, *supra*.

A state may not, by statute, deny a group of otherwise qualified voters the right to vote, absent a compelling state interest. "[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.' " *Dunn* v. *Blumstein*, *supra* at 337, quoting *Kramer* v. *Union School District*, *supra* at 627 (emphasis added in *Dunn*); *see Rosario* v. *Rockefeller*, *supra* at 763 (Powell, J., dissenting).

The Court has recognized a particular need to protect the associational rights of independent voters, since a law inhibiting independent voter participation in the electoral process is directed at "voters whose political preferences lie outside the existing political parties" and who may lack representation in state legislatures adequate to protect their rights. *Anderson* v. *Celebrezze*, *supra* at 793-94 & 793 n. 16; *Developments in the Law*: *Elections*, 88 Harv. L. Rev. at 1136 n. 87.

In this case, Connecticut's unaffiliated electors are qualified voters and meet the requirements established by the Party for voting in statewide Republican primaries. They are precluded from participating in such primaries by the statutory restriction contained in § 9-431. This restriction may only be upheld if supported by compelling state interests and if narrowly drawn to serve such compelling interests. *Id.*

c. The Statute Impermissibly Interferes with the Right of Party Candidates to Seek Unaffiliated Voter Support.

Appellees Weicker, McKinney and Johnson are, in addition to being members of the Republican Party, elected federal office-holders in Connecticut. Pursuant to the Party Rule they may seek the support of unaffiliated voters at Republican primaries, as well as in the general election. Section 9-431 interferes with appellees' rights, as candidates for office, to seek such support.

This Court has held that a "candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Buckley* v. *Valeo*, *supra* at 52. In *Buckley*, the Court held unconstitutional the ceiling on personal expenditures by candidates established by the Federal Election Campaign Act of 1971, 18 U.S.C. § 608(a)(1). *Id.* at 52-53. While stressing the societal importance of unfettered debate of a candidate's qualifications and policies, *id.* at 14, the Court also took note that an expenditure by a candidate "directly facilitates his own political speech." *Id.* at 52 n. 58.

In the same vein, a candidate's right to appeal to a particular group of like-minded voters is a personal right of advocacy, fully protected under the First Amendment. *See id.* at 22; *Anderson* v. *Celebrezze*, *supra* at 787. Indeed, the right of a candidate to appeal to a diverse electorate implicates not only the candidate's First Amendment rights but the right of the voters as well to a meaningful choice among candidates. *Anderson* v. *Celebrezze*, *supra* at 787; *Bullock* v. *Carter*, *supra* at 143.

Because § 9-431 interferes with a candidate's right to seek unaffiliated voter support in accordance with his Party's rules, and correlatively impinges on unaffiliated voter access to like-minded candidates, the statute substantially violates appellees' First Amendment right of political association.

d. The First Amendment Infringement is Substantial.

Appellant contends that the statutory requirement of public party affiliation for participation in a party primary is trivial and that any purported infringement of appellees' right of association resulting from the statute is "de minimis." App. Br. at 62. Appellant further argues that appellees can appeal to Connecticut's unaffiliated voters in other ways outside the primary process.

Appellant misperceives the significance of the public affiliation requirement and its impact on the Party's effort to enlist the support of independent voters. Enrollment with a party constitutes a formal and public statement of a voter's personal belief. Independent voters, in Connecticut and elsewhere, have a commitment to their unaffiliated status which causes them to be unwilling to affiliate formally with a political party. The reasons for this unwillingness may be many: the voter may support one candidate but not all candidates proposed by a party; he may agree with some party policies but not the platform of the party as a whole; he may identify with the local party but not with the national party, national candidates or national policies.

In addition, public affiliation with the party may have serious social consequences for an elector. *See Elrod* v. *Burns*, 427 U.S. 347 (1976). A voter may hold a job or position in society in which it is important to remain politically neutral; the voter may be a government employee who, for perceived reasons of job security, does not want to identify with a particular party; the voter's business or social position may also make public affiliation undesirable. For whatever reason, the voter may fear the consequences of publicly disclosing membership in a political party. *See NAACP* v. *Alabama*, *supra*. Or, there may be no logical reasons at all for a voter's refusal to affiliate.

In Connecticut, over one third of the registered electorate has historically chosen to remain unaffiliated. Appellant's

argument that an affiliation requirement is "de minimis" trivializes a voter's decision to affiliate and ignores the long-standing history in Connecticut of a committed independent electorate.

The Party Rule recognizes that unaffiliated voters will often be unwilling to give up their independent status and that an affiliation requirement will act as a barrier to involving them in Party affairs. Thus, rather than requiring the independent voter to agree to a formal public affiliation with the Party, the Rule attempts to achieve a coalition between the Party and the independent voter(s). Both groups are allowed to retain their identity, but the candidates selected by the Party through its primary will reflect the combined interests and concerns of each. Whether, in the future, the unaffiliated voter decides to become a formal member of the Party, whether he expresses a private affiliation by participating in the Party primary and supporting Party candidates in future general elections, or whether his participation is limited to supporting a specific candidate in a specific primary, the end result is the same: a coalition—that is, an association betweeen the Party and the independent voter. That association will not occur if public affiliation is required for primary participation.

The Connecticut Democratic Party, which participated in this action as an *amicus* in the court of appeals and supported appellant's position, clearly recognized that appellees' Rule would have a significant competitive impact on the voting patterns and associations of unaffiliated voters. Thus, in its brief to the court of appeals, the Democratic Party admitted that it "must respond to [appellees' Rule]—like it or not—or run the risk of losing the support of unaffiliated voters in the general election." Dem. Party Amicus Br. at 4.

It is clear that the Party's present ability to appeal to unaffiliated voters, which appellant suggests is more than adequate to allow whatever association is desired, is inadequate. Despite the informal appeals for unaffiliated support suggested by appellant, the Republican Party has been unable

to obtain substantial unaffiliated support and has been unable to win statewide elections in Connecticut on a consistent basis for the past twenty-five years. Appellees are constitutionally entitled to attempt new and competitive ways of increasing support for their Party to replace old, unsuccessful ways. *Williams* v. *Rhodes*, *supra* at 32.

As the court of appeals observed, the Party can do nothing to overcome the barrier to their proposed association imposed by the statute. [J.S. App. 99 n. 24.] Unlike the situation in *Rosario* v. *Rockefeller*, *supra*, the Party can not preserve its associational rights by itself effectuating timely registration; unlike the situation in *Marchioro* v. *Chaney*, 442 U.S. 191 (1979), the burden on associational rights is caused solely by the statute and not by any party action. If the Party's attempt to form a coalition with unaffiliated voters constitutes protected First Amendment action—as it clearly does—the State's imposition of a barrier to the coalition which is beyond the power of the Party to surmount and which, on its face, is in conflict with the desire of one-third of Connecticut's electorate, cannot be deemed "de minimis."

2. The Constitutional Standard of Review.

State infringement upon the right of political association—like infringement upon freedom of speech—is subject to the "closest scrutiny." *NAACP* v. *Alabama*, *supra* at 460-61. This Court has, thus, repeatedly held that a state statute that imposes substantial burdens on a political party's right of political association is unconstitutional unless the State demonstrates a compelling state interest and employs precisely tailored means to avoid unnecessary abridgement of associational freedoms. *Roberts* v. *United States Jaycees*, *supra* at 3258; *Democratic Party*, *supra* at 124; *Buckley* v. *Valeo*, *supra* at 25; *Cousins* v. *Wigoda*, *supra* at 489; *Williams* v. *Rhodes*, *supra* at 1; *Tribe*, at 786; *Note*, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. at 124.

3. Appellant Has Failed to Demonstrate a Compelling Interest Justifying the State's Infringement of Appellees' Right of Political Association.

Nowhere in her Brief does appellant contend that the State's interests in the public affiliation requirement of § 9-431 are "compelling" or that the statute is narrowly drawn. Rather, appellant contends only that "the interests of the State are substantial," App. Br. at 52, and that the lower court erroneously applied a strict scrutiny analysis to the First Amendment issues presented. App. Br. at 48.

Appellees submit that the lower courts correctly subjected § 9-431 to strict constitutional scrutiny and, moreover, that the interests identified by the State do not support the First Amendment infringement of appellees' rights even under the lesser standard proposed by appellant.

Although appellant does not precisely delineate in her Brief to this Court the interests of the State she claims are "substantial," in her briefs in the lower courts she identified essentially four such interests: (1) preserving party identity and thus preventing voter confusion; (2) preventing inter-party raiding; (3) promoting orderly election administration; and (4) preserving a stable two-party system.

a. The Party Rule Does Not Undermine Party Identity or Promote Voter Confusion.

Appellant first argues that the statute is necessary to insure that the candidates selected at Party primaries will, in fact, represent the views of Party members. Appellant argues that the State has an interest in protecting voters from being misled about the ideologies of candidates associated with the Republican Party label. Appellees submit that no issue of "voter confusion" or "preserving party identity" is properly involved in this case.

The Party Rule does not in any way affect the requirements which must be met by Republican Party candidates for place-

ment on the primary ballot and, if successful in the primary, for the general election. A candidate must be a registered member of the Party and must receive twenty (20%) percent of the vote cast at the Party's nominating convention to qualify for placement on the ballot. Delegates to the convention are selected from and by Party members only. Conn. Gen. Stat. §§ 9-372, *et seq.*

Thus, the candidate offered to the public at the general election will be a registered Republican representing the choice of the members of the Republican Party. The involvement of unaffiliated voters in the party primary will only insure that the Republican candidate chosen will have the greatest likelihood of receiving the bi-partisan support necessary to win the general election.

More fundamentally, however, the State has no legitimate interest in requiring the Republican Party to maintain a given party ideology or constituency. There can be no distortion of the Party's philosophy from the inclusion of unaffiliated voters, where the Party has specifically sought their input. The two party system is not undermined by one party's expansion of its electoral base; and even if a party adopts a self-destructive course of action, the State has no right to interfere. *Democratic Party, supra* at 123-24. As the district court held, the concern that the Party Rule "will 'destabilize' the Republican Party is a matter for Republicans to consider; it is not an appropriate subject for state legislation." [J.S.App. 195].

Indeed, appellant's assertion of the need to preserve party labels is, itself, of doubtful validity. This Court has recently recognized that party labels often mean little:

> Major parties encompass candidates of greater diversity. In many situations the label "Republican" or "Democrat" tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum.

Buckley v. *Valeo, supra* at 70.

Appellant's apparent belief that the Connecticut electorate will be unable to inform itself about the policies and goals of Republican Party candidates is also unsupportable. As this Court observed in rejecting a similar argument against allowing an independent party on the ballot in Ohio,

> "Today the vast majority of the electorate not only is literate but also is informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates."

Anderson v. *Celebrezze*, *supra* at 797; *see also Dunn* v. *Blumstein*, *supra* at 358.

No legitimate, let alone compelling, state interest in avoiding voter confusion is served by § 9-431.

(b) There is No Threat of "Raiding"

In the lower courts, appellant contended that § 9-431 is necessary to deter "raiding." Although this argument is not specifically raised in appellant's Brief in this Court, *see* App. Br. at 52-62, appellant's discussion in a related section of her Brief, App. Br. at 65, of *Rosario* v. *Rockefeller*, *supra*, makes it unclear whether appellant has abandoned her claim that the Party Rule would engender raiding.

In any event, raiding is not a realistic problem in this case. "Raiding" is a practice in which "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario* v. *Rockefeller*, *supra* at 760.[10] The State's interest in

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10. The ability of a party or a group of people to organize an effective "raid" in an open primary, under any circumstances, has been severely questioned and is subject to great doubt. *See Openness, Participation and Party Building Reforms for a Stronger Democratic Party* 68 (1978) (Winograd Commission) ("the existence of 'raiding' has never been conclusively proven by survey research"); Note, *Developments in the Law: Elections*, 88 Harv. L. Rev. at 1173; Note, *The Constitutionality of Non-Member Voting in Political Primary Elections*, 14 Willamette L.J. at 282-86; *see generally*, Bickel, *Reform and Continuity* 63-64 (1971); A. Ranney, *Turnout and Representation in Presidential Primary Elections*, 66 Am. Pol. Sci. Rev. 21, 35-36 (1972).

preventing raiding can only arise if the Party Rule somehow allows voters hostile to the Republican Party to manipulate the outcome of Party primaries.

The Party Rule presents no opportunity for raiding not already existing under Connecticut election law. Although described by appellant as creating an "open" primary, in fact, the Party has invited only unaffiliated voters to join in its primaries. The Rule does not allow registered Democrats to "cross-over"—i.e., vote in a Republican party primary—while remaining members of the Democratic Party. Thus, the Rule supports no new concern that members of the Democratic party might be induced to "raid" Republican primaries: there is no greater chance, under the Party Rule, that a voter would leave the Democratic party and become unaffiliated in order to "raid" a Republican primary then, as now permitted under Connecticut law, he would leave the party and register as a Republican to sabotage its primary.

Moreover, Conn. Gen. Stat. § 9-59 provides that a voter enrolled in a party may not vote in another party's primary for a period of six months after leaving his original party. Thus, only if a registered Democrat is willing to renounce his party membership six months before a Republican primary—*i.e.*, before the Republican Party convention and before he even knows whether there will be a Party primary—can he participate in a Republican primary as an unaffiliated voter. Any Democrat so intent on raiding that he would follow that unlikely course could just as easily renounce his party membership and join the Republican Party and vote in *all* Republican primaries irrespective of the Party Rule.

Participation in Party primaries by unaffiliated voters (who have not left a party), of course, presents no spectre of raiding. Raiding, by definition, only applies to an invasion by unwelcome voters; here, the Republican party has expressly invited all unaffiliated voters in Connecticut to participate in the Party's statewide primaries. Whether Party policy or candidate selection is substantially affected, the Party has made its

choice of strategies in the political marketplace and is constitutionally entitled to reap the fruits—or famine—of its decision. "As is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Democratic Party, supra* at 124.[11]

(c) Appellees' Rule Does Not Interfere With Orderly Election Administration.

Appellant also contends that the Party Rule may seriously interfere with the State's ability to administer party primaries. This claim, which is factual in nature, was rejected, as unsupported by the evidence, in both lower courts. Appellant has not advanced any "most exceptional circumstances" which would warrant this Court's departure from its "settled practice" of declining to reconsider factual determinations in which the district court and court of appeals have concurred. *See Branti* v. *Finkel*, 445 U.S. 507, 512 n. 6 (1980); *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978). Indeed, appellant cites no actual record evidence to support her claimed administrative burden. In fact, appellant produced no evidence below of undue cost, time or other practical obstacle to implementation of the Rule.

To the contrary, Albert P. Lenge, Director of appellant's Elections Division, testified in state legislative hearings that appellees' Rule was "workable from an election administration viewpoint." [J.A. 52]. In his testimony, Lenge explicitly addressed the purported problem now asserted by appellant concerning absentee ballots, testifying that a procedure for

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11. Even if the State could properly assert a compelling interest in preventing "raiding" by unaffiliated voters, the Party Rule does not alter the existing opportunity of independent voters to disrupt a party's primary process in Connecticut. Pursuant to the Democratic legislature's enactment of Public Act 84-118, any unaffiliated voter in Connecticut may enroll in a party until noon of the day before a primary and participate in the party's primary election. As the lower courts observed, the State's enactment of P.A. § 84-118 belies any concern with raiding by unaffiliated voters. [J.S.App. 116, 188-89].

preparation and distribution of such ballots could be implemented without problem. [J.A. 52]. Also easily resolvable, according to Lenge, was appellant's now expressed concern for monitoring unaffiliated voter participation in only one primary:

> That is workable from an election administration viewpoint provided we by regulations do such things as provide for the registrars to produce a list of unaffiliated voters to be checked off at the polls. . . . [S]omeone so checked [could not then] vote in the other party's primary if the other party also decides to open it up to unaffiliated voters. . . .

[J.A. 52].

Clearly, any fears which appellant might have concerning the implementation of the Party Rule are "no more than 'theoretically imaginable'. No such remote danger can justify the . . . crippling impact on the basic constitutional rights involved in this case." *Williams* v. *Rhodes*, *supra* at 33; *see also Democratic Party of the United States* v. *Wisconsin*, *supra* at 125-26.[12]

d. The Party Rule Does Not Undermine the Two-Party System.

Appellant contends, at great length, that the closed primary system mandated by § 9-431 is necessary to preserve Connecticut's two-party system. Appellant argues that the Republican Party will be severely weakened, the power of its leaders eroded and the Party faithful betrayed if unaffiliated voters are allowed to participate in Party primaries. Appellant predicts the demise of the Party and the two-party system in Connecticut as a result.

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12. There is not even evidence that the State would be required to purchase additional voting machines as opposed to simply reprogramming existing machines and providing an exterior switch to differentiate the applicable unaffiliated or Party member ballot.

Appellant's purported desire to save the Republican Party might be legitimate if the open primary concept were being imposed on the Party contrary to its wishes. Here, however, the Party has affirmatively chosen to open its primary process to independent voters. The Party's decision was reached after extensive study of ways to improve Party electoral success by a Party subcommittee and after approval by Party delegates to a state party convention.

As previously discussed, a political party has a fundamental First Amendment right to make precisely such decisions, even if—as appellant contends—the party's judgments are likely to be wrong and the party weakened as a result. *Democratic Party, supra* at 123-24. Indeed, the growth and demise of various parties throughout this nation's history reflects precisely such freedom to make wise or unwise decisions about policies and future courses of action. As Professor Emerson has written:

> The principle is plain that there can be no interference with freedom of expression on the general ground that it will lead to social change, or change at the wrong rate, or in the wrong direction.

T. Emerson, *The System of Freedom of Expression*, 47 (1970). Quite simply, if appellant is correct that a primary system open to unaffiliated voters will destroy the Republican Party, social ch nge will occur and a new party will inevitably replace the old

Moreover, the history of open or modified open primaries in this country plainly reveals that the two-party system is not destroyed by such a process. Open primaries, similar in concept to the Party Rule, were first advocated at the beginning of this century. The purpose of opening primaries to all voters was "to preserve the overall integrity of the electoral process by encouraging increased voter participation in the political process." *LaFollette* v. *Democratic Party of the United States*, 93 Wis. 2d 473, 287 N.W.2d 519, 536 (1980), *rev'd*, 450 U.S. 107 (1981). They were adopted as a result of "the state's

interest in protecting the primacy of the individual voter over political machines, bosses and parties." Note, *State Intrusions Upon the Associational Freedoms of Political Parties*, 1983 Wis. L. Rev. 211, 214; S. Schier, *The Rules and the Game* 37 (1980).

As a result, nine states have adopted pure open primary procedures whereby any registered voter is allowed to vote in a party primary, regardless of whether he is enrolled in that party.[13] Three states allow registered voters to participate in all party primaries for public office.[14] In addition, seventeen states allow a previously unaffiliated voter to participate in a party primary provided he "affiliates" with the party at the time of, and for the purpose of, voting in the primary.[15] Only twenty-one states, including Connecticut, require a voter to be registered with a party prior to participation in the party's primary.[16]

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13. Hawaii Rev. Stat. § 12-31; Idaho Code §§ 34-402, 34-404, 34-904; Mich. Comp. Laws §§ 168.575, 168.576; Minn. Stat. § 204D.08(4); Mont. Code Ann. § 13-10-301(2); N.D. Cent. Code § 16.1-11-22; Utah Laws § 20-3-19(2); Vt. Stat. Ann. Tit. 17 § 2363; Wisc. Stat. §§ 5.37, 6.80(e).

14. Alaska Stat. §§ 15.05.010, 15.25.090; La. Rev. Stat. §§ 18:401B, 18:521B; Wash. Laws § 29.18.200.

15. *See generally* M. Jewell & D. Olson, *American State Political Parties and Elections* 107-11 (1982); Ala. Code § 17-16-14(b); Ark. Stat. Ann. § 3-126; Ga. Code §§ 34-624, 34-626; Ill. Ann. Stat. Ch. 46 § 7-44; Ind. Code Ann. §§ 3-1-9-3, 3-1-9-10 (Burns); Iowa Acts §§ 43.41, 43.42; Mass. Gen Laws Ann. Ch. 53 § 37; Miss. Code Ann. § 23-1-81; Mo. Laws § 115.397; N.H. Rev. Stat. Ann. § 654.34II; N.J. Rev. Stat § 19:23-45; Ohio Rev. Code Ann. § 3513.19; R.I. Gen. Laws § 17-9-26(c); S.C. Code Ann. §§ 7-5-120, 7-9-20; Tenn. Code Ann. § 2-7-115(b)(2); Tex. Stat. Arts. 5.02, 13.01a(4); Va. Code § 24.1-182.

16. Ariz. Rev. Stat. Ann. §§ 16-123, 16-152; Cal. Elec. Code § 501; Colo. Rev. Stat. § 1-2-203; Conn. Gen. Stat. § 9-431; Del. Code Ann. § 15-1302; Fla. Stat. § 101.021; Kan. Stat. Ann § 25-3301; Ky. Rev. Stat. §§ 116.045, 116-055; Me. Rev. Stat. Ann. Tit. 21 §§ 131 *et seq.*; Md. Elec. Code Ann. §§ 3-8 *et seq.*; Neb. Rev. Stat. § 32-530; Nev. Rev. Stat. § 293.287; N.M. Stat. Ann. § 1-4-16; N.Y. Elec. Law § 1-104.9; N.C. Gen. Stat. § 163.74; Okla. Stat. Tit. 26 § 1-104; Or. Rev. Stat. § 247.201; Pa. Stat. Ann. Tit. 25 § 2832; S.D. Codified Laws Ann. § 12-4-15; W. Va. Code § 3-1-35; Wyo. Stat. § 22-5-212.

Moreover, three states allow the party to determine voter eligibility in party primaries. *See* Ala. Code § 17-16-14; Ark. Acts §§ 3-102, 3-115; S.C. Code. Ann. § 17-9-20.

In none of these states has the two party system been destroyed as a result of the open or modified open primary process. It is through the inclusion of voters in the electoral process—not exclusion—that factionalism and its evils are avoided. *See* R. E. Dawson, "Social Development, Party Competition, and Policy," in *The American Party System* 208-09 (1967).

The constitutional issue posed by this case is not whether political scientists or politicians disagree over what form of primary is best; clearly, they do. Rather, the issue is whether the State has a compelling interest in mandating that a party adhere to a given process for selection of its candidates, contrary to the party's constitutionally permissible determination. Saving the Republican Party from itself is plainly not such an interest.

4. Even if the State Has a Compelling Interest, the Statute Fails to Employ the Least Restrictive Means.

Where a state infringes the right of political association, "a heavy burden of justification is on the state" to show that the statute is finely drawn to serve the state's asserted interest *and* does not unnecessarily burden constitutionally protected activity. *Dunn* v. *Blumstein*, *supra* at 343; *Kusper* v. *Pontikes*, *supra* at 58-59. If a less burdensome method of achieving its interest is available, a "state may not choose the way of greater interference." *Dunn* v. *Blumstein*, *supra* at 343.

While appellees submit that none of the interests asserted by appellant are sufficient to uphold the statute as applied to the Party Rule, even assuming that any of the interests asserted by the State are "compelling" or "substantial," § 9-431 is plainly not the least restrictive means available for promoting such interests.

If the State is truly concerned about "raiding," it can increase the statutory period a voter must wait after leaving one party before participating in another party's primary or establish an additional waiting period after participation in a primary before a voter is eligible to vote in another party's primary. Similarly, the State can increase the statutory period an unaffiliated voter must wait before being eligible to participate in a party primary.

If the State sincerely fears administrative difficulties in implementing the Party Rule, it can require the Party to enact its rules sufficiently in advance of a primary to provide adequate time for administrative implementation.[17] It might further require the Party to establish that its proposed Rule is administratively feasible.

If the State feels that voter education is necessary, it is free to issue non-partisan descriptions of the primary laws and voter eligibility requirements to eliminate any perceived voter confusion.

Finally, the State has not justified its demand for *formal* and *public* party affiliation as a prerequisite for primary participation. The State could provide for a temporary and non-disclosable affiliation for purposes of the primary only, as many other states do. *See* n. 15, *supra*. Such "affiliation" could occur on the day of the primary and would satisfy any interest the State might conceivably have in insuring the integrity of the election.

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17. In fact, the Party followed the precise procedures set forth by appellant's Director of Elections, in conformance with applicable Connecticut laws for modifying party rules. [*See* J.S.App. 49-61].

II. SECTION 9-431, AS APPLIED TO THE PARTY RULE, IS NOT A PROPER EXERCISE OF THE STATE'S CONSTITUTIONAL AUTHORITY UNDER ARTICLE I, §§ 2 AND 4, OR THE TENTH OR SEVENTEENTH AMENDMENTS.

Appellant maintains that the states have the constitutional power under Article 1, §§ 2 and 4 and the Tenth and Seventeenth Amendments to determine who may participate in party primaries. This Court has repeatedly held, however, that the states' constitutional authority to supervise elections and establish qualifications for voters may not be exercised in violation of First Amendment protections. *Anderson* v. *Celebrezze*, *supra* at 794 n. 18; *Kusper* v. *Pontikes*, *supra* at 57; *Williams* v. *Rhodes*, *supra* at 29.

As the Court stated in *Kusper*:

> [A]dministration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections.
>
> . . . .
>
> [Thus] unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.

414 U.S. at 57.

Appellees recognize that this Court's decisions in *Democratic Party*, *supra*, and *Cousins* v. *Wigoda*, *supra*, which affirmed a party's fundamental right under the First Amendment to establish its own candidate selection process, involved a national party's rules for presidential delegate selection, and that different considerations may apply to state involvement in a state party's primary. Statewide elections do not necessarily involve the extra-territorial party interests identified in *Democratic Party* and *Cousins*, nor is there the danger that different

states will impose conflicting regulations on a state party's process. In addition, a state's interest under Article I, § 2 and 4 and the Seventeenth Amendment in supervising wholly internal elections is more direct than its responsibility over national presidential elections.

But a political party's fundamental interests in determining its membership, determining who may participate in candidate selection, modifying party policy and expanding popular support through coalitions with other groups or individuals, and improving its chances for winning elections are not affected by the national or state character of the party or the election. "Since the infringement of the associational rights of a party and its members would be substantially the same if the processes at stake were those of the state party rather than the national party . . . strict scrutiny . . . should be extended to cover all instances of interference by law in internal party processes." *Tribe* at 787.

The State's constitutional power to conduct and supervise primary elections thus does not, of itself, confer authority to restrict a party from determining who should participate in its primary. *See Democratic Party, supra*; *Cousins* v. *Wigoda, supra*; *O'Brien* v. *Brown, supra*. The State's interest is in the fairness of the primary, and as long as a party does not impermissibly *exclude* qualified voters, *see Terry* v. *Adams, supra*, or manipulate participation in the primary in order to dilute the weight given to party voters in violation of the Fourteenth or Fifteenth Amendments, *see Gray* v. *Sanders, supra*, the Party's requirements for participation in the Party primary are of no legitimate concern to the State. *Democratic Party, supra* at 124 n. 27.

It may be that a state may establish minimum voter participation requirements in its state primaries *greater* than those adopted by a state party. Such authority, if it exists, would derive from the state's interest in utilizing its primaries to insure a fully "representative" nominating process. Thus, for example, Wisconsin's long-standing tradition of unrestricted

voter participation in its open primaries *might* be found to override a state party's more restrictive delineation of voter eligibility. *But see* Kester, *Constitutional Restrictions on Political Parties*, 60 Va.L.Rev. at 759-60; *The Supreme Court, 1980 Term*, 95 Harv.L.Rev. at 244; Note, *The Right to Vote and Restrictions on Crossover Primaries*, 40 Chi.L.Rev. at 659. The Court need not, however, resolve here that issue, since in this case the State is not seeking to expand the primary voter base to insure a more representative character, but rather argues it may *narrow* voter participation in contravention of a political party's rules.

Appellant's argument, joined in by the *amici* States, that the court of appeals' decision in this case puts other state election laws in jeopardy fails to recognize this crucial distinction. State laws directed to the conduct of a primary which are necessary to insure the fairness and representative character of the process clearly may serve compelling state interests and may override a party's competing First Amendment rights. *See, e.g., American Party of Texas* v. *White*, 415 U.S. 767 (1974). Where, however, a party adopts procedures expanding voter participation in a fair and constitutionally permissible primary process, a state's interest in the conduct of its elections is satisfied and the First Amendment rights of the party prevail.[18]

Finally, the fact that the Party is exercising its association rights in the context of a state-financed primary does not alter

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18. This case thus presents a balance of the competing constitutional interests of the Party and the State different than that involved in *Langone* v. *Secretary of the Commonwealth*, 388 Mass. 185, 446 N.E.2d 43 (1983). In *Langone*, a state party rule limited a party member's statutory right to force a primary to candidates receiving fifteen percent of the convention vote, thus narrowing the state's determination of the requirements for a fully representative process. Under the analysis above, such a rule would yield to the state's compelling right to provide a representative primary system. The party rule at issue in *Langone* was upheld by the Massachusetts Supreme Court because it reasonably furthered the statutory primary system. *Id.* at 48.

the constitutional analysis. As this Court stated in *Bullock* v. *Carter*, 405 U.S. at 148-49:

> Without making light of the State's interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters.

III. NEITHER ARTICLE I, SECTION 2, NOR THE SEVENTEENTH AMENDMENT BARS THE RULE ADOPTED BY APPELLEES.

Appellant further contends that the Party's Rule is unconstitutional under Article I, § 2 and the Seventeenth Amendment to the United States Constitution because it establishes different qualifications for voting in Republican primaries for federal and state representatives. Appellant argues that these constitutional provisions require absolute symmetry in voter eligibility for state and federal legislative primaries. Appellees submit that the provisions of Article I, § 2 and the Seventeenth Amendment relied upon by appellant are neither applicable to the Party Rule nor violated by its terms.

Article I, § 2 of the Constitution provides that:

> The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.[19]

There are thus two elements to this constitutional provision: the first—setting forth the method for electing congressional representatives—provides that the American people shall have the right to choose their federal representatives; the second—the qualifications provision—ensures that no voters eligible to vote in state legislative elections will be precluded from voting in federal congressional elections.

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19. The Seventeenth Amendment contains nearly identical language concerning the qualifications of electors for United States Senator.

Appellant's claim that the Party Rule violates the qualifications provision is based on the following line of reasoning: (1) the "right to choose" established in the first part of Article I, § 2 has been interpreted to protect the right to vote at primary elections; (2) the qualifications provision is thus applicable to primary elections; and (3) the qualifications provision precludes a party from expanding voter eligibility for federal legislative primaries beyond the voter eligibility requirements applicable to state legislative primaries.

While appellant's first contention is correct, *see United States* v. *Classic*, *supra*, her remaining two propositions are unsupportable.

A. The Qualifications Provisions Do Not Apply to Primary Elections.

Appellant contends that the word "Electors" in the qualifications provision of Article I, § 2 applies to primary voters. Appellant's argument is based on this Court's reliance on Article I, § 2 in *United States* v. *Classic*, *supra*, and *Smith* v. *Allwright*, *supra*, to protect the right to vote at federal elections. Appellant misunderstands the Court's reliance on Article I, § 2 in these opinions.

In *Classic*, Louisiana state election officials accused of altering and falsely counting ballots cast in a congressional primary were prosecuted by the Government under a federal statute prohibiting interference with federal constitutional rights. The district court dismissed the indictment on the ground that the defendants' conduct at the primary violated no federal constitutional right, and the Government appealed. The Court was thus required to decide if fraud at a congressional primary violated any right under the Constitution.

The Court held that the language "chosen . . . by the people" in the first part of Article I, § 2 created for qualified voters a secured constitutional "right to choose" their representatives, a right that included the right to "cast their ballots and to have them counted at congressional elections." *Id.* at

314-15. The Court held that a Louisiana congressional primary was such "an integral part of the election procedure," *id.* at 318, that fraud at the primary could render meaningless the voter's subsequent exercise of his right to choose at the general election. This was especially true in *Classic*, where a one-party electoral system in Louisiana virtually assured the primary winner success in the general election. *Id.* at 319. The Court thus asserted federal control over the state primary, through Article I, § 2, in order to insure that the right to vote at the general election was not deprived of meaning. *Id.* at 323-324. *Classic* did not hold, however, that a primary was an "election" subject to all of the Constitution's electoral prescriptions.[20]

The Court's recognition in *Classic* that a party primary is an integral part of a state's electoral scheme provided the basis for the holding in *Smith* v. *Allwright*, *supra*, that a state's delegation to a political party of the power to establish voter qualifications at a primary constitutes delegation of a state function. The party's exclusion of blacks from a Texas party primary was, thus, state action subject to the constraints of the Fifteenth Amendment. *Id.* at 661-62.

Neither *Classic* nor *Smith* support appellant's contention that primaries are "elections" subject to the constraints of Article I, § 2 and other provisions of the Constitution. Rather, *Classic* upholds the regulation of primaries under Article I, § 2 in order to insure that the right to vote at congressional elections remains meaningful, and *Smith* recognizes that because primaries are an integral part of a state's electoral scheme, the action of political parties in the primary can constitute state action subject to the Fourteenth and Fifteenth Amendments.

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20. It is important to note that the *Classic* Court applied only the first part of Article 1, Section 2—which "secure[s] to the people the right to choose representatives by . . . some form of election." *Id.* at 318, *see also id.* at 332 (Douglas, J., dissenting). The Supreme Court did not apply the qualifications provision of the Article to the primary, as the case did not involve the right of a party to determine its membership. *See Smith* v. *Allwright*, *supra* at 669 (Roberts, J., dissenting).

Appellant's argument that *Classic* and *Allwright* establish that party primaries are subject to the constitutional requirements applicable to general elections was expressly rejected in *Ray* v. *Blair*, 343 U.S. 214 (1952). In *Ray*, a candidate in a party primary for presidential elector challenged a state party's rule requiring him to pledge support for the national party's ultimate presidential nominee. The candidate contended, *inter alia*, that such a pledge violated the constitutional freedom of a presidential elector under Article II, § 1, which he claimed was applicable to primary candidates for presidential elector under *Classic* and *Allwright*.

The Court specifically rejected the argument that *Classic* and *Allwright* established that party primaries were subject to each of the constitutional provisions pertaining to elections:

> The fact that the primary is a part of the election machinery is immaterial. . . . It was the violation of a secured right that brought about the *Classic* and *Allwright* decisions. Here, they do not apply unless there was a violation of the Twelfth Amendment. . . .

Id. at 227.

The Court emphasized that a party primary is not required to conform to each election provision of the Constitution:

> . . . [E]ven if such [loyalty] promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. 2, § 1, . . . *it would not follow that the requirement of a pledge in the primary is unconstitutional.*

Id. at 230 (emphasis added).

Appellant's contention that the qualifications provision applies to voter eligiblity in primary elections is thus not supported by the cases upon which she relies. Equally important, there is no evidence that the founding fathers—when they adopted Article I, § 2—or Congress—when it ratified the

Seventeenth Amendment—intended the provisions to apply to party primaries. The founding fathers clearly did not anticipate that Article I, § 2 would apply to primaries, as neither political parties nor primaries then existed. *Ray* v. *Blair, supra* at 224 n. 11; *Newberry* v. *United States*, 256 U.S. 232, 250 (1921); *see generally* Note, *Judicial Intervention in National Political Conventions: An Idea Whose Time Has Come*, 59 Corn. L. Rev. 107, 113-115 (1973).

Although the Seventeenth Amendment was ratified after many states had enacted primary systems, the Congress utilized no language indicating the Amendment would cover such primaries. In fact, it is likely that Congress believed that it would not apply. *See* 47 Cong. Rec. 223 (1911) (statement of Rep. Lenroot) ("this amendment . . . will be of little value, because special interests will nominate in both political parties the candidates for the United States Senate, and the people will be compelled to choose between the two . . ."). When Congress wanted to subject party primaries to constitutional protection, it specifically did so. *See* U.S. Const., amend. XXIV, § 1 (the "right of citizens . . . to vote in any *primary* or other election . . ."). Indeed, since prior to *Classic* and the White Primary Cases, party primaries were considered private activities not subject to federal regulation, *see Newberry* v. *United States*, *supra* at 250, it is unlikely that Congress would have intended the Seventeenth Amendment to apply to party primaries without substantial debate.

Moreover, as the court of appeals observed, application of the qualifications provision to party primaries could produce incongruous results. [J.S.App. 59-60]. There is, for example, no constitutional requirement that a state adopt the same nominating procedures for state and federal elections; thus, a state's electoral scheme may completely exclude the use of primaries for state office while providing primaries for federal office. If appellant's interpretation of the qualifications provision is correct, a federal office primary under such circumstances would be precluded, as there would be no eligible pool

of voters from a state office primary qualified to vote in the federal primary.

Appellant's attempt to subject party primaries to the qualifications provisions of Article I, § 2 and the Seventeenth Amendment is thus unsupported by the language of the provisions or by applicable case law, historical circumstances or logic. The court of appeals properly held that the qualifications provisions of Article I, § 2 and the Seventeenth Amendment do not apply to state party primaries.

B. The Party Rule is Consistent With the Qualifications Provisions.

Even if the qualifications provisions do apply to party primaries, the Party Rule is consistent with the language and intent of the provisions and is not constitutionally invalid. The history of the provisions makes clear that they were not intended to limit participation in congressional electives—as appellant contended—but rather to *prevent* restriction of the franchise in congressional elections.

Although, the first part of Article 1, § 2—the right of the people to choose the members of the House of Representatives—was universally accepted by the delegates to the Constitutional Convention,[21] the qualifications provision was the subject of great controversy. The Framers recognized that the "definition of the right of suffrage . . . [was] a fundamental article of a republican government." I Story, *Commentaries on the Constitution of the United States* § 583 at 405. Adoption of a uniform national standard for federal voting was, however, impossible. If the standard of one state had been endorsed, those states with different rules would have objected. Similarly, an entirely new federal standard would likely have disenfranchised (in federal elections) some voters who were eligible to

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21. The framers "held . . . in the highest reverence and respect" the principle that the "most numerous branch should have an immediate dependence upon . . . the people." I Story, *Commentaries on the Constitution of the United States* § 573 at 395 (2d ed. 1851).

vote in state elections, thus undermining popular support for the Constitution. *Id.* at §§ 583-84, pp.405-7; D. Hutchison, *The Foundations of the Constitution* 31 (1928).

As James Wilson of Pennsylvania stated:

> It would be very hard & disagreeable for the same persons, at the same time, to vote for representatives in the State Legislature and to be excluded from a vote for those in the Natl. Legislature.

II *The Records of the Federal Convention of 1787* 201 (M. Farrand ed.)[22]

The founding fathers were also concerned that if definition of the right of suffrage was left soley to the states, discrimination against federalism would lead states to exclude voters from congressional elections, thereby "render[ing] too dependent on the State Governments, that branch of Federal Government, which ought to be dependent on the people alone." *The Federalist* No. 52, at 354 (J. Madison) (J. Cooke ed. 1961); *see also The Federalist* No. 57, at 385 (J. Madison).

In creating a national standard for suffrage, the Framers were thus confronted with two problems: first, the need to reaffirm the right of the individual states to establish federal voting standards, and second, the need to guard against efforts by the states to undermine popular support for the House of Representatives through restrictions on voter eligibility in federal representative elections. The language of the "qualifications provisions" in Article 1, Section 2 (later repeated in the Seventeenth Amendment) was adopted as a compromise by the Framers in light of these competing concerns. It allowed the

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22. Other delegates expressed similar sentiments. Oliver Elseworth of Connecticut warned the Convention that "people will not readily subscribe to the Natl. Constitution, if it should subject them to be disfranchised." II *The Records of the Federal Convention of 1787* at 201. Benjamin Franklin and John Rutledge of South Carolina also spoke against the problem of "narrowing" or "restraining" the right of suffrage. *Id.* at 205; *see also* I Story, *Commentaries on the Constitution of the United States* § 586, at 409.

states to maintain their own voter qualifications for federal elections, while at the same time insuring that the states could not utilize more restrictive voter qualifications for federal representatives than applicable in state legislative elections. *See* I Story, *Commentaries on the Constitution of the United States* §§ 583-84, pp. 405-07 (2d ed. 1851); D. Hutchinson, *The Foundations of the Constitution* 31 (1928); *The Federalist* No. 52, at 354 (J. Madison).

Appellees' Rule is fully consistent with the language and intent of the qualifications provision. Any elector qualified to vote in a Republican Party primary for state repreentative is also eligibile to vote in the congressional primaries. No voter qualified in the state office primaries is excluded from the congressional primaries; to the contrary, the Rule operates to include additional voters in such primaries. As the district court stated after reviewing the history and purpose of the qualifications provision, "Neither the language nor the history of Article I, Section 2 precludes a more expansive classification of eligible voters in congressional as opposed to state legislative elections." [J.S.App. 168].

The State cites no authority for its claim that absolute symmetry of voter eligibility in state and federal office primaries is required, nor has it attempted to dispute the history or intent of the qualifications provision set forth by appellees.[23] As Judge Oakes, concurring below [J.S.App. 133-34], stated:

> All that article I, section 2 means, it seems to me, is that anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote for Congress and the Seventeenth Amendment applies the same rule to the selection of senators.

The Party Rule fully complies with that requirement.

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23. The Seventeenth Amendment was also clearly intended to open the political process to more people. *See, e.g.*, H.R. Rep. No. 2, 62d Cong., 1st Sess. (1911); 47 Cong. Rec. 231 (1911) (statement of Rep. Norris) (amendment "is a step toward placing the real government in the hands of the people themselves").

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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